

MCWHIRTER REEVES
ATTORNEYS AT LAW

ORIGINAL

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602
P. O. BOX 3350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:

TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 FAX

January 2, 2003

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

RECEIVED-FPSC
03 JAN - 2 PM 3:51
COMMISSION
CLERK

Re: Docket No.: 020413-SU

Dear Ms. Bayo:

On behalf of Adam Smith Enterprises, Inc. I am enclosing the original and 15 copies of the following:

- ▶ Adam Smith Enterprises, Inc.'s Motion for Reconsideration of Order No. PSC-02-1774-FOF-SU Granting Motion for Emergency Relief

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and pleading by returning the same. Thank you for your assistance in this matter.

Yours truly,

Joseph A. McGlothlin
Joseph A. McGlothlin

JAM/mls
Enclosure

| | |
|-----|----------------------|
| AUS | _____ |
| CAF | _____ |
| CMP | _____ |
| COM | _____ <u>3</u> _____ |
| CTR | _____ |
| ECR | _____ |
| GCL | _____ |
| OPC | _____ |
| MMS | _____ |
| SEC | _____ <u>1</u> _____ |
| OTH | _____ |

RECEIVED & FILED

Mur
FPSC-BUREAU OF RECORDS

MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, DECKER, KAUFMAN & ARNOLD, P.A.

DOCUMENT NUMBER - DATE
00038 JAN - 2 03
FPSC - COMMISSION CLERK

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings
Against Aloha Utilities, Inc. in Pasco
County for failure to charge approved
Service availability charges, in violation
Of Order No. PSC-01-0326-FOF-SU and
Section 367.091, Florida Statutes

Docket No. 020413-SU

Filed: January 2, 2003

**ADAM SMITH ENTERPRISES, INC.'S
MOTION FOR RECONSIDERATION OF ORDER NO. PSC-02-1774-FOF-SU
GRANTING ALOHA'S MOTION FOR EMERGENCY RELIEF**

Pursuant to Rules 28-106.204 and 25-22.060, Florida Administrative Code, Adam Smith Enterprises, Inc. (Adam Smith), files this Motion for Reconsideration of that portion of Order No. PSC-02-1774-FOF-SU¹ that grants Aloha Utilities, Inc.'s (Aloha) Motion for Emergency Relief. As grounds therefor, Adam Smith states:

Introduction

1. In Order No. PSC-02-1250-SC-SU,² the Commission assigned an effective date of April 16, 2002 to the tariff of Aloha that increased its sewer service availability charge from \$206.75 per ERC to \$1650 per ERC. Elsewhere in the same PAA Order, the Commission purported to authorize Aloha to attempt to apply the tariff retroactively so as to collect, from developers/builders, the difference between \$206.75 and \$1650 for connections made between May 23, 2001 and April 16, 2002. On October 2, 2002, Adam Smith protested this aspect of the PAA Order, thereby rendering the authority a nullity as a matter of law.

2. Subsequently, in the Order that is the subject of this Motion for Reconsideration, the Commission granted Aloha's Motion for Emergency Relief and allowed Aloha to attempt to collect from developers immediately the difference between the then-effective tariff rate of

¹ Hereinafter "Order Granting Emergency Relief."

² Hereinafter "PAA Order."

\$206.75 per ERC and the \$1650 per ERC of the tariff that was approved to become effective on April 16, 2002. The Commission further ordered that the monies Aloha collected be held in escrow pending the final hearing in this matter. In so ruling, the Commission overlooked several matters and made mistakes of law. On reconsideration, the Commission should deny the “emergency” request.

Standard for Motion for Reconsideration

3. The standard for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. *See, Stewart Bonded Warehouse, Inc. v. Bevis*, 294 So.2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962); *Pingree v. Quaintance*, 394 So.2d 162 (Fla. 1st DCA 1981). In this instance, the Commission made several mistakes of law that require reconsideration.

There Is No Basis in Law for Aloha to Collect Charges Retroactively That Are the Subject of “Preliminary” Agency Action

4. The PAA Order authorized Aloha to attempt to collect from Adam Smith, and others, amounts for connections made between May 23, 2001 and April 16, 2002 allegedly due under a service availability tariff that did not become effective until April 16, 2002. Adam Smith protested the PAA Order, including that portion authorizing Aloha to attempt to collect amounts for the service availability tariff not in effect.³ Thus, that portion of the PAA Order purporting to authorize retroactive collections for the higher service availability charges is a nullity and of no force and effect⁴; that is, there is *no authority* for Aloha to collect the differential in charges

³ See Petition of Adam Smith Enterprises, Inc. for Formal Proceeding on Proposed Agency Action and Request for Hearing, filed October 2, 2002.

⁴ *See, Florida Department of Transportation v. J.W.C. Co., Inc.*, 396 So.2d 778 (Fla. 1st DCA 1981); Order No. PSC-98-0450-FOF-EQ.

since the PAA Order granting that authority was protested and is therefore void. Thus, there can be no authority for the Order Granting Emergency Relief that, by its very nature, assumes the current lawfulness of the very matter that is the subject of the protest.

5. In ruling otherwise, the Commission made a mistake of law. In the Order Granting Emergency Relief, the Commission said:

At page 22 of Order No. PSC-02-1250-SC-SU, in the section of the Order titled "Docket Closure," we ordered that "[i]n the event of a protest, the tariff shall remain in effect, held subject to refund, pending resolution of the protest." That decision was not issued as a PAA. Therefore, it has not been rendered a nullity by virtue of the protests filed to the PAA portions of the Order.⁵

However, in the ruling on the Motion for Emergency Relief, the Commission overlooked the fact that it ruled previously that the effective date of the tariff would be April 16, 2002. The fact that it ruled that the April 16, 2002 tariff would "remain in effect" prospectively is a totally different matter than whether Aloha is authorized by the Commission to try to collect charges retroactively to May 23, 2001. The former is unrelated to, and provides no authority for the latter. Because the portion of the PAA Order dealing with retroactive application has been protested, there is no underlying authority upon which to base a temporary or preliminary retroactive application of the tariff. The Commission overlooked this impact of the protest in the Order Granting Emergency Relief.

The Commission Also Made A Mistake Of Law By Relying On Orders Which Do Not Support Its Decision To Grant Emergency Relief

6. In the Order Granting Emergency Relief, the Commission found it had inherent authority to grant emergency relief pursuant to its general ratemaking power.⁶ However, the Commission overlooked the fact that prior notice to customers is a condition precedent to any

⁵ Order Granting Emergency Relief at 9.

⁶ *Id.*

general authority it may have to grant emergency relief. Therefore, such authority cannot apply to retroactive applications of a tariff for which no prior notice was given. Importantly, in the same Order in which it mistakenly voted to grant the request for emergency relief, the Commission noted that Aloha did not substantially complete providing notice to affected customers until April 16, 2002. Even the order upon which the Commission relies in support of its inherent authority, Order No. PSC-97-0207-FOF-SU⁷, involves the prospective application of a tariff and clearly requires prior customer notice. While Order No. PSC-97-0207-FOF-SU did “find it appropriate to approve the utility’s tariff request for emergency wastewater rates, subject to refund, until we make our final decision,”⁸ the approval contained the following requirement:

[t]he tariffs filed by Forest Hills shall be effective for service rendered on or after the stamped approval date on the tariff sheets pursuant to Rule 25-30.475(1), Florida Administrative Code, *provided the customers have received notice*. The rates shall not be implemented until proper notice has been received by the customers. The utility shall provide proof of the date notice was given within 10 days after the date of the notice.⁹

7. The Commission also relies on two additional cases to support the Order Granting Emergency Relief.¹⁰ However, the Commission overlooked that these cases, properly construed, do not support its ruling.

⁷ *In re: Application for limited proceeding increase in wastewater rates by Forest Hills Utilities, Inc.*, Docket No. 961475-SU.

⁸ *Id.* at 5.

⁹ *Id.* at 6, *emphasis added*.

¹⁰ The Order Granting Emergency Relief cited to the portion of the PAA Order at pp. 18-19 in which these cases were discussed:

no act or order of this Commission has altered the utility’s service availability charge approved by Order No. PSC-01-0326-FOF-SU. Therefore, the utility should have timely charged the amount approved by that order for service availability. See U.S. Sprint Communications Co. v. Nichols, 534 So.2d 698 (Fla. 1988) (finding that once a tariff sheet error is discovered, the Commission has the power and the duty to order compliance with its original decision). See also Order No. PSC-95-0045-FOF-WS, issued January 10, 1995, in Docket No. 941137-WS (finding that, although certain tariff sheets reflecting the utility’s gross-up authority were missing from the utility’s tariff, the utility had the authority to collect the gross-up charges pursuant to Commission orders, given that the missing tariff sheets were never cancelled by an order).

8. In *U.S. Sprint Communications Co. v. Nichols*, 534 So.2d 698 (Fla. 1988), Sprint, a Southern Bell customer, protested the fact that it was not given the opportunity for a hearing when Southern Bell corrected an incorrectly filed tariff. However, in that case, at no time did Southern Bell attempt to collect the charges pursuant to the incorrectly filed tariff on a retroactive basis. The changes implemented by the corrected filing were prospective only. The order has no application to the issue of “retroactive” emergency relief raised by Aloha’s motion.

9. The other order the Commission relies upon, Order No. PSC-95-0045-FOF-WS,¹¹ concerned a case where, even though the tariff sheets were missing from the files, the utility had collected the charges in the missing sheets. The customer had paid the disputed amounts under protest, and then argued that since there was no tariff sheet on file, the charges did not have to be paid, as they were not contained in a valid tariff. The utility had at all times been charging customers the higher amount and the customers were obviously aware of the amount charged. Thus, at all times, customers had notice of the utility’s approved charges. Again, this order does not support the retroactive application of a tariff for which the customers had no notice prior to April 2002 -- whether on a temporary “emergency” or permanent basis.

10. Therefore, in contrast to the current case, where affected customers had no notice of the increased charges, in each of the orders the Commission relied upon to support the Order Granting Emergency Relief, the affected customers had **notice** of the charges at issue. In this case, there was **no** customer notice of the increase in service availability charges **until** April 16, 2002. As required by Rule 25-30.475, Florida Administrative Code, and by the basic notions of

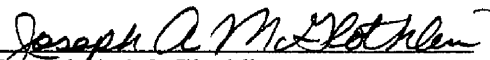
¹¹ *In re: Complaint of Indianwood Development Corporation, Inc. against Indiantown Company, Inc. regarding certain refunds and provision of service in Martin County*, Docket No. 941137-WS.

procedural due process, no customer can be expected to pay a charge of which they did not have adequate notice. The Commission overlooked this fact and made a mistake on law in its Order Granting Emergency Relief.

Conclusion

11. The Commission overlooked and failed to consider certain matters constituting mistakes of law when it granted Aloha's Motion for Emergency Relief. On reconsideration, it should deny the motion.

WHEREFORE, Adam Smith requests that the Commission reconsider its Order Granting Emergency Relief.


Joseph A. McGlothlin
Joseph A. McGlothlin
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman & Arnold, PA
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2525
Facsimile: (850) 222-5606
jmcglothlin@mac-law.com

Attorneys for Adam Smith Enterprises, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Adam Smith Enterprises, Inc.'s Motion for Reconsideration of Order No. PSC-02-1774-FOF-SU Granting Motion for Emergency Relief has been furnished by (*)hand delivery, (**)email, or U.S. Mail this 2nd day of January 2003 to the following:

(*)Rosanne Gervasi
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Blvd
Tallahassee, FL 32399-0850

(*) Harold McLean
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Blvd
Tallahassee, FL 32399-0850

Stephen G. Watford
6915 Perrine Ranch Road
New Port Richey, FL 34655-3904

Stephen Burgess
Office of Public Counsel
111 W. Madison Street, #812
Tallahassee, FL 32399-1400

(**)Suzanne Brownless, P.A.
1975 Buford Blvd
Tallahassee, FL 32308-4466


Joseph A. McGlothlin